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85-2159

Supreme Court, U.S.
FILED
JUN 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985
NO. _____

ALPHONSO THOMPSON, Petitioner
v.
THE HOUSING AUTHORITY OF THE CITY OF LOS ANGELES, a public corporation, THE BOARD OF COMMISSIONERS OF THE HOUSING AUTHORITY OF THE CITY OF LOS ANGELES, MICHAEL H. SALZMAN, AS EXECUTIVE DIRECTOR OF THE HOUSING AUTHORITY OF THE CITY OF LOS ANGELES, and individually, Respondents.

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Counsel for Petitioner

36 pp

QUESTIONS PRESENTED

1. Whether plaintiff,[1] in fact, failed to comply with the Court's order to be ready for pretrial on October 16, 1984, where plaintiff prepared a Pretrial Conference Order including all the matters requested by defendants and defendants unreasonably refused to sign it, and the Court Clerk refused to file it without the signatures of both counsel, resulting in the failure to have the Order before the Court on the day of the conference.

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1. To avoid confusion, the parties will be referred to in this Petition as plaintiff and defendants.

2. Whether defendants should be rewarded with a dismissal of plaintiff's action where defendants were substantially culpable for plaintiff's proposed Pretrial Conference Order being refused for filing by the defendants unreasonably refusing to sign it.

3. Whether dismissal is too drastic a sanction for less than full compliance with Local Rule 9, F.R.Civ. P. Rule 16 and a specific order of the court, where defendants interfered with plaintiff's preparation of a Pretrial Order by filing untimely and repetitive motions, and refusal to sign the proposed Pretrial Order which contained all of defendants' requested matters; especially whether the sanction is too drastic where no lesser or any sanctions have been previously imposed.

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NO._____

ALPHONSO THOMPSON, Petitioner
v.
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THE HOUSING AUTHORITY OF THE CITY OF LOS ANGELES, a public corporation, THE BOARD OF COMMISSIONERS OF THE HOUSING AUTHORITY OF THE CITY OF LOS ANGELES, MICHAEL H. SALZMAN, AS EXECUTIVE DIRECTOR OF THE HOUSING AUTHORITY OF THE CITY OF LOS ANGELES, and individually, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, ALPHONSO THOMPSON, respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 11, 1986.

I. OPINION BELOW

The Opinion of the Court of Appeals appears in the Appendix hereto.

II. JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was entered on February 11, 1986. A timely Petition for Rehearing was denied on March 12, 1986 and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

III. QUESTIONS PRESENTED

1. Whether plaintiff,[1] in fact, failed to comply with the Court's order to be ready for pretrial on October 16, 1984, where plaintiff prepared a Pretrial Conference Order including all the matters requested by defendants and defendants unreasonably refused to sign it, and the Court Clerk refused to file it without the signatures of both counsel, resulting

---

1. To avoid confusion, the parties will be referred to in this Petition as plaintiff and defendants.

in the failure to have the Order before the Court on the day of the conference.

2. Whether defendants should be rewarded with a dismissal of plaintiff's action where defendants were substantially culpable for plaintiff's proposed Pretrial Conference Order being refused for filing by the defendants unreasonably refusing to sign it.

3. Whether dismissal is too drastic a sanction for less than full compliance with Local Rule 9, F.R.Civ. P. Rule 16 and a specific order of the court, where defendants interfered with plaintiff's preparation of a Pretrial Order by filing untimely and repetitive motions, and refusal to sign the proposed Pretrial Crder which contained all of defendants' requested matters; especially whether the sanction is too drastic where no lesser or any sanctions have been previously imposed.

IV. STATEMENT OF THE CASE

1. Factual Statement.

Plaintiff ALPHONSO THOMPSON was employed by defendant HOUSING AUTHORITY OF THE CITY OF LOS ANGELES (HACLA) on November 3, 1975, pursuant to a Civil Service Examination. The position was newly created - SOCIAL SERVICES PROGRAM DIRECTOR. Plaintiff had not previously been employed by HACLA, but there were several candidates for the position who were HACLA employees and it appears that there was considerable resentment of this "outsider."

The resulting treatment of plaintiff is the gravamen of this action. The details of that treatment are not germane to this Petition. Suffice it to say that it constituted a violation of plaintiff's civil rights and resulted in severe emotional distress.

2. Procedural Statement.

This case originated as one for violation of the civil rights of plaintiff under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e), et. seq., 28 U.S.C. §§ 1331, 1343 and 2201; pursuant to a Notice of Right to Sue; Breach of Employment Contract; Conspiracy; Deprivation of Benefits of Unemployment Insurance Law of California; and Intentional Infliction of Emotional Distress.

As a result of an appeal and various motions of defendants, the case is now reduced to one for violation of civil rights of plaintiff under Title VII of the Civil Rights Act of 1964; and the pendent State claim for Intentional Infliction of Emotional Distress.

All matters relevant to the Court of Appeals' decision giving rise to this

Petition occurred subsequent to the NOTICE RE PRETRIAL CONFERENCE AND SCHEDULING ORDER of January 26, 1984. That Order set the Pretrial Conference on June 4, 1984, the discovery cut-off date at May 4, 1984, and, provided that any pretrial motions be served within 90 days (by April 25, 1984). At the meeting of counsel on April 24, 1984, pursuant to Local Rule 9.4, counsel for defendants advised plaintiff's counsel that defendants would move for a Partial Summary Adjudication. April 25 was the last day to file a motion. That motion and some unfinished discovery prompted plaintiff to request a continuance of the June 4, 1984, pretrial date, to which defendants stipulated. The continued date was June 16, 1984.

The delay occasioned by that continuance should be charged to both counsel equally.

Plaintiff successfully defended against defendants' motion for summary judgment on June 4, 1984.

No Pretrial Conference Order was filed for the July 16, 1984 conference. Plaintiff had prepared an order without defendants' input or participation because of time problems on the part of both counsel, preventing a meeting of counsel. Space was left at the end of each section therein, for defendants to add their input, but they refused to do so.

The Court continued the Pretrial Conference to August 13, 1984. The resulting delay should probably be charged 75% to plaintiff and 25% to defendants.

The unilaterally prepared conference order was served on defendants on July 13, 1984. Defendants made no comment thereon, nor offered any input until by letter of July 30, 1984, received by

plaintiff on August 1, 1984. Plaintiff prepared a Pretrial Conference Order incorporating defendants' material, but was unable to have it prepared to file on August 6, 1984, the last day to file it for the August 13, 1984 conference. The Pretrial Conference was again continued, this time to October 14, 1984.

The delay this time should probably be charged 60% to plaintiff and 40% to defendants.

Defendants had been served a copy of the Order which had incorporated the material defendants submitted to plaintiff in their July 30, 1984 letter, at the August 13, 1984 hearing. Defendants made no comment or criticism of the Order, nor offered any further material. On October 8, 1984, the day before it must be filed for the October 15, conference (October 8 was a Court holiday), plaintiff

served defendants a revised version of the August edition of the conference order. It was substantially the same and contained all of defendants' material.

Defendants first refused to sign it outright, then agreed to let plaintiff know the next day whether it would be signed. There was time within which changes could be made to make it acceptable to them, and still file it before the Clerk's Office closed on October 9. Defendants made no attempt to revise the Order, but rather, drafted a criticism of it stating reasons they would not sign it.

Defendants had possessed the previous draft of Pretrial Conference Order for almost two months (August 13 to October 8, 56 days) without offering any comment, correction, objection, or addition. That previous draft was substantially the same as the one defendant refused to sign,

with criticism of it made, not to plaintiff on October 8 when there was a day to remedy it, but later to the Court, rationalizing the refusal to sign. Why didn't defendants criticize or offer corrections and additions to the previous version during those 56 days?

The failure to have a Pretrial Conference Order signed by both parties filed on time for the October 15, 1984 Pretrial Conference should be charged to defendants 90% and to plaintiff 10%.

Yes, there were other shortcomings of plaintiff alleged. The fact remains that if there had been a Pretrial Conference Order on file, the case would not have been dismissed. The defendants should have been charged with substantial contribution for the failure to have a proper order on file for the October 15, 1984 Pretrial Conference.

V. ABSENCE OF APPLICABLE LAW

There are many reported cases on the subject of dismissals for failure to comply with court rules, both Federal Rules of Civil Procedure and Local Rules. And there is a split of authority on the affirming or overruling such cases.

No case has been found by counsel that has considered the question raised in the instant case. It is for that reason that no citations appear in this Petition. Counsel would refer this Honorable Court to the strong public policy that cases should be resolved on their merits.

It is noteworthy that, while this plaintiff raised the question of giving a reward of dismissal of plaintiff's case to a defendant who contributed substantially to the failure to comply with the rules, the Court of Appeals did not even give mention to that question.

The defendant's contribution to plaintiff's failures to comply with the rules was also pointed out in plaintiff's Motion, in District Court, to Set Aside the Dismissal Pursuant to Rule 60. Nowhere did the Judge so much as acknowledge consideration of plaintiff's argument regarding defendant's contribution to the failure to comply.

VI. CONCLUSION

For these reasons, a writ of certiorari should issue to review the Judgment and Opinion of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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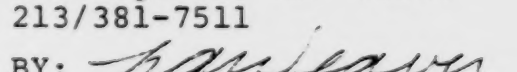
BY: 
LOYAL A. WEAVER
Counsel for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALPHONSO THOMPSON,	)	NO. 84-6524
	)	
Plaintiff-Appellant,	)	D.C. NO.
	)	CV-82-396-AWT
vs.	)	
	)	ORDER
HOUSING AUTHORITY OF THE CITY OF LOS ANGELES, et al.,	)	
	)	
Defendants-Appellees.	)	
	)	

Before: NELSON and BOOCHEVER, Circuit Judges, and SCHWARTZER*, District Judge.

Upon due consideration, Appellant's Petition for Rehearing is DENIED.

*Honorable William W. Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALPHONSO THOMPSON,	) NO. 84-6524
	) D.C. #
Plaintiff/Appellant,	) CV 82-396
	) AWT
v.	)
	) OPINION
THE HOUSING AUTHORITY OF THE CITY OF LOS ANGELES, a public corporation, et al.,	)
Defendants/Appellees.	)

Appeal from the United States District Court for the Central District of California

Argued and Submitted -- December 2, 1985

Decided -- February 11, 1986

Before: NELSON and BOOCHEVER, Circuit Judges, and SCHWARZER,* District Judge

PER CURIAM

Alphonso Thompson appeals from an order of dismissal with prejudice for failure to comply with the pretrial orders

*Honorable William W. Schwarzer, United States District Judge for the Norhtern Distrct of California, sitting by designation.

and rules of the district court. We find that the district judge did not abuse his discretion and therefore affirm.

Thompson brought this action under Title VII. He alleged that his termination by defendant Housing Authority of the City of Los Angeles on January 22, 1979, violated his civil rights. Initially he instituted administrative proceedings which were dismissed; that dismissal was affirmed by the state court. He then filed a complaint in the district court alleging a variety of claims. Defendants moved to dismiss. Thompson's opposition was filed late. The district court granted the motion, both because of Thompson's failure to comply with the rules and because of the res judicata effect of the state court order.

On appeal this court affirmed the dismissal with respect to all claims except the Title VII claim. In accordance with

the mandate, Thompson on August 15, 1983, filed an amended complaint under Title VII. Defendants filed an answer on November 14, 1983.

On January 26, 1984, the district court issued its pretrial order, scheduling a pretrial conference for June 4, 1984. Pursuant to Local Rule 9.4, counsel met on April 24, 1984, to exchange certain information required by the Local Rules. It is not disputed that Thompson's counsel was not prepared to proceed as required. At Thompson's request the pretrial conference was continued to July 16, 1984, the court's order stating that "[n]o further continuances will be granted except for good cause shown, on noticed motion."

Under Local Rule 9.8.1, Thompson was required to prepare a pretrial conference order, submit it to opposing counsel and lodge it with the clerk of the court

seven days before the conference. Thompson failed to comply with the rule. Instead, on Friday, July 13, 1984, at 4:05 p.m., he delivered his proposed order to defendants' counsel for the pretrial conference scheduled for Monday. Counsel, finding the proposed order inadequate and having no time within which to attempt to arrive at an agreed order, declined to sign it.

At the conference on July 16, the court continued the pretrial conference to August 13, 1984, since no order had been lodged and the parties were not ready to proceed. The court specifically directed the parties to complete pretrial preparations and issued an order directing Thompson to show cuase why the action should not be dismissed for failure to prepare for the pretrial conference.

At the pretrial conference on August 16, 1984, Thompson had not lodged a proposed pretrial conference order and was

again not ready to proceed. The court extended the discovery cut-off to September 13, 1984, and continued the pretrial conference to October 15, 1985. He advised Thompson's counsel that "I will give you one more chance. . . . If you are not ready the next time, I will dismiss the case."

Prior to the October 15, 1984, pretrial conference, Thompson submitted a proposed pretrial conference order to defense counsel who, on account of inaccuracies, errors, and omissions, refused to sign it. Because the order was not signed by both counsel, the clerk refused to file or lodge it. At the conference, in response to the court's question, both counsel stated that they were not ready to proceed. The court then dismissed the action for failure to comply with the Local Rules, Fed. R. Civ. P. 16, and the court's order. In

his order of dismissal, the district judge stated that he had "considered all of the alternative sanctions available and finds that no sanction short of dismissal is appropriate in these circumstances.[1]

---

1. The district judge in his memorandum also relied on Thompson's failure to comply with Local Rule 9.8.1 by filing a "woefully inadequate" memorandum of contentions of law and of fact and on the fact that "no proposed pretrial conference order, signed by all counsel, was timely lodged under Local Rule 9.8.1 or at all." Inasmuch as we find adequate grounds for sustaining the district court, we need not consider the appropriateness of a dismissal with prejudice for technical deficiencies in a party's attempted compliance with local pretrial rules, see McCargo v. Hedrick, 545 F.2d 393 (4th Cir. 1976), including the failure of the clerk to file or lodge a proposed pretrial conference order because defendants' counsel declined to sign it.

DISCUSSION

District courts have inherent power to control their dockets. In the exercise of that power they may impose sanctions including, where appropriate, default or dismissal. Link v. Wabash Railroad Co., 370 U.S. 626 (1961). Dismissal, however, is so harsh a penalty it should be imposed as a sanction only in extreme circumstances. Henderson v. Duncan, Slip Op. No. 84-2708 at 4 (9th Cir. Jan. 7, 1986); Raiford v. Pounds, 640 F.2d 944, 945 (9th Cir. 1981) (per curiam); Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336, 1339, (9th Cir. 1970). We have repeatedly upheld the imposition of the sanction of dismissal for failure to comply with pretrial procedures mandated by local rules and court orders. Buss v. Western Airlines, Inc., 738 F.2d 1053 (9th Cir. 1984),

cert. denied, ___U.S.___, 105 S.Ct. 968 (1985); Chism v. National Heritage Life Insurance Co., 637 F.2d 1328 (9th Cir. 1981); Transamerica Corporation v. Transamerica Bancgrowth Corp., 627 F.2d 963 (9th Cir. 1980). However, because dismissal is such a severe remedy, we have allowed its imposition in these circumstances only after requiring the district court to weigh several factors: (1) the public's interest in expeditions resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits and (5) the availability of less drastic sanctions. Henderson, Slip Op. No. 84-2708 at 4 and 5; Ash v. Cvetkov, 739 F.2d 493, 496 (9th Cir. 1984), cert. denied, 105 S.Ct. 1368 (1985); Mir v. Fosburg, 706 F.2d 916, 918 (9th Cir. 1983).

We review such a dismissal for abuse of discretion. Henderson v. Duncan, supra. The record, illuminated by counsel's admissions at oral argument, establishes the following facts:

The court first scheduled a pretrial conference on January 26, 1984, to be held on June 4, 1984.

At Thompson's request, the conference was continued to July 16, 1984, then to Augsut 13, 1984, and finally to October 15, 1984.

On none of those occasions was Thompson prepared to proceed with the conference, much less go to trial.

On three occasions, Thompson was warned that failure to be prepared would lead to dismissal of the action.

Although Thompson's counsel argues that he had not been able to complete discovery, he made no attempt to conduct discovery between March 1984, when he

took the depositions of Housing Authority personnel, and the continued discovery cut-off of September 16, and sought no additional time from the court.

It is clear from this record that the district judge gave Thompson abundant opportunity and incentive to prepare for the pretrial conference and trial. The court's patience in granting continuances in this case indicates that it weighed the various factors required by Henderson before imposing the sanction of dismissal. In these circumstances we cannot say that the district judge abused his discretion in dismissing the action.

Thompson also appeals from the denial of his motion for relief under Rule 60(b)(1) and (6). Motions for relief under Fed. R. Civ. P. Rule 60(b) are addressed to the sound discretion of the trial court. Martella v. Marine Cooks & Stewards Union, 448 F.2d 729, 730 (9th

Cir. 1971), cert. denied, 405 U.S. 974 (1972). Accord, Hoptowit v. Spellman, 753 F.2d 779, 783 (9th Cir. 1985); Savarese v. Edrick Transfer Storage, Inc., 513 F.2d 140, 146 (9th Cir. 1975). Accordingly, we review for abuse of discretion. Uinted States v. Russell, 578 F.2d 806, 807 (9th Cir. 1978); Plotkin v. Pacific Tel and Tel. Co., 688 F.2d 1291 (9th Cir. 1982).

The record before us reflects no evidence of "mistake, inadvertence, surprise, or excusable neglect," or "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. Rule 60(b)(1), (6). To the contrary, the record reveals a long history of inexcusable delay and neglect on the part of plaintiff's counsel. In the circumstances of this case, the district judge acted within his discretion in denying relief under Rule 60(b)(1) and (6).

AFFIRMED

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 82-396-AWT Date 10/15/84

==========

DOCKET ENTRY

==========

PRESENT:
Hon. A. Wallace Tashima, Judge

Shelly Keir	Lenoir Eddy
Ceputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
Loyal Weaver	James L. Ferro

PROCEEDINGS: PRETRIAL CONFERENCE

The matter not being ready for the Pretrial Conference, Court orders the action dismissed with prejudice for plaintiff's failure to comply with Local Rule 9. Federal Rule of Civil Procedure 16 and the specific order of the Court to be prepared by this date for Pretrial. Defendant instructed to prepare a formal order.

Initials of Deputy Clerk /s/

MINUTES FORM 11
CIVIL-GEN. D-M

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALPHONSO THOMPSON, Plaintiff, v. HOUSING AUTHORITY OF THE CITY OF LOS ANGELES, et al., Defendants.	)	NO. CV82-396 AWT MEMORANDUM ORDER OF DISMISSAL

By order filed Jan. 26, 1984, the pretrial conference ("PTC") was set in this matter for June 4, 1984. By stipulation and order, filed May 4, 1984, at the request of plaitniff, the PTC was continued to July 16, 1984. The Court endorsed on the stipulation the following: "No further continuances will be granted except for good cause shown on noticed motion."

On July 16, 1984, the matter was not ready for pretrial. The PTC was continued for four weeks to August 13. The

parties were instructed to timely complete pretrial preparations. In addition, an order to show cause ("OSC") was orally issued, returnable on the same date, why the action should not be dismissed for failure to prepare for pretrial. Defendants on July 12, had filed three motions based on asserted violations of Local Rule 9 by plaintiff: (1) Motion to dismiss; (2) Motion to exclude witnesses; (3) Motion to exclude exhibits. Put charitably, plaintiff's response to these motions, filed July 30, does not deny counsel's dereliction. Although it purports to be "not offered as an excuse, but an explanation," it staisfactorily fulfills neither role.

Mindful of the attendant consequences of any meaningful sanction, the Court, at the hearing on August 13, perhaps mistakenly, granted plaitniff one final opportunity to prepare for pretrial.

Plaintiff was granted an additional month in which to take discovery and the PTC was continued for two months, to October 15, 1984. Plaintiff's counsel was admonished in open court that this was his last opportunity and that if he were not prepared for the PTC, the matter would be dismissed. Ten days prior to the latest continued date for the PTC, defendants renewed their three-part motion for sanctions for violations of Local Rule 9. Again, the essential, factual material set forth in the motions is not disputed in plaintiff's opposition thereto.

During the period covered by the several continuances of the PTC, and despite ample opportunity and specific admonition by the Court, plaintiff has done nothing to remedy his many shortcomings under Local Rule 9. For example, despite the failure of the 40-day meeting, Local Rule 9.4, held on April 24, 1984, to

accomplish the objectives set forth in Local Rules 9.4.1 to 9.4.11, plaintiff has made no attempt to schedule a second or supplemental 40-day meeting; plaintiff's memorandum of contentions of fact and law is woefully inadequate and does not comply with Local Rule 9.5; and no proposed pretrial conference order, signed by all counsel, was timely lodged under Local Rule 9.8.1, or at all.

The Court has considered all of the alternative sanctions available and finds that no sanction short of dismissal is appropriate in these circumstances. To do less is to implicitly authorize continual failure of counsel to comply with the rules and order of the Court. Defendants' request for the additional sanction of attorney's fees, although not undeserved, is denied.

The action is ordered dismissed with prejudice for continued and willful failure

to comply with F.R. Civ. P. 16; Local Rule 9 and the specific order of this Court, pursuant to F. R. Civ. P. 16(f) and Local Rule 27.

DATED October 19, 1984

/s/
A. WALLACE TASHIMA
United States District Judge